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Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 230

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

JONES NATIONAL BANK, DEFENDANT IN ERROR.

No. 231

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

UTICA BANK, DEFENDANT IN ERROR.

No. 232

CHARLES E YATES ET AL, PLAINTIFFS IN ERROR,

vs.

TH MAS BAILEY, DEFENDANT IN ERROR.

No. 233

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS, AND REPLY TO DEFENDANT'S BRIEF.

J. W. DEWEESE,
FRANK E. BISHOP. AND
HALLECK F. ROSE,
Attorneys for Plaintiffs in Error.

JACOB NORTH & CO., PRINTERS, LINCOLN, NEB.

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BRIEF OF PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM, AND REPLY TO DEFENDANT'S BRIEF ON THE MERITS.

I.

Statement.

On the eve of the hearing, defendants have moved to dismiss, or affirm, and have supported the motions with an

elaborate brief. We do not here attempt a re-statement of the case. In our brief on the merits, we have shown that the pleadings, evidence, and assignments of error were sufficient to refer to the state supreme court for decision the rights claimed by plaintiff in error under an act of Congress. We showed also that the state supreme court necessarily held, on the question of practice involved, that the proceedings taken by plaintiff in error were sufficient to raise the federal questions, and that they were definitely adjudicated adversely to the contention of plaintiffs in error. Our former brief, therefore, exhibits sufficient of the record to show that this court has jurisdiction to review the judgment on writ of error, pursuant to section 709, Revised Statutes of the United States, as that section is interpreted by this court. In the absence of any proceeding questioning the jurisdiction, the mere exhibition of the record was deemed sufficient. But since counsel now question the sufficiency of the record to raise the federal questions, we shall present the cases which definitely sustain the jurisdiction.

We shall not attempt the same latitude of inquiry covered by the brief in support of the motions; but shall disregard the authorities and suggestions in that brief directed to the points (1) that an order by a U. S. circuit court to remand a suit removed from a state court of *original* jurisdiction before trial is not reviewable, and (2) that to justify removal from the state court of *original* jurisdiction, because the suit involves a federal question, the presentation of such question must appear from the plaintiff's petition, and can not be aided by averments contained in the petition for removal or in the answer of defendant. Juris-

diction is here asserted only under section 709 Revised Statutes of the United States. The reasons for conferring jurisdiction upon this court to review *final judgments* of the state courts of last resort are widely divergent from those authorizing a removal or transfer from the courts of original jurisdiction before judgment. One statute confers appellate powers, and the other confers original powers. Generally, the state courts have concurrent jurisdiction with the federal courts to enforce rights arising under federal laws. The state courts are the forums most convenient to the parties, and acts of Congress confer on them exclusive original jurisdiction (except as otherwise specifically provided) in all cases where the amount in controversy does not exceed $2,000. It is presumed that the state courts in such cases will correctly interpret the federal statutes and enforce the rights claimed thereunder. So the policy of Congress has been to very greatly limit and restrain the right of removal, the mere transfer of controversies before trial, to the circuit courts of the United States. The national government having adopted that policy in respect to removal, the system of the federal judiciary would be wholly incomplete but for section 709 giving authority to this court to revise the *final judgments* rendered by the state courts denying rights asserted under authority of the government of the United States. It is by virtue of the jurisdiction to review and revise such judgments conferred by section 709 that the supremacy of the federal authority, declared by the constitution, can be maintained in such cases. It is under this latter authority alone that jurisdiction is here invoked. The other questions discussed by the briefs supporting the motion are purely academic and have no bearing upon the controversy,

except as the form of their presentation may be edifying to the members of the court and tend to display the learning of counsel. We shall limit our review of the cases to those which involve the one question of the power of this court to review *final judgments* rendered by the state courts of final authority.

II.

All that is necessary to sustain jurisdiction under the present writ is that the record show the federal right to have been claimed in the state court in such form as to refer it to that court for decision.

That the state court assumed the question to have been sufficiently raised, and actually decided it, is well-nigh, if not wholly, conclusive upon this court, of the fact that the federal right was sufficiently set up and claimed by plaintiffs in error in the state court.

The sole claim of jurisdiction, as above stated, is under what this court has repeatedly termed the *third clause* of section 709, Revised Statutes United States. That clause is as follows:

"A final judgment or decree in any suit in the highest court of the state . . . [third clause] where any title, right, privilege, or immunity is *claimed* under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up *or claimed*, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

Some of the earlier decisions gave undue prominence, and almost controlling force, to the words "specially set up," employed in the clause quoted. That construction, however, was obviously more narrow and strict than the terms employed in the entire section warranted. The precedent condition, which precedes the last quoted words, required only that the right, etc., be "claimed" under a statute of the United States, and that when the decision is against the privilege so "specially set up *or* claimed," the Supreme Court shall have power to re-examine, etc. Manifestly, the statute intends to confer jurisdiction to review such judgments in all cases where the right is actually claimed and denied by the judgment. By the precise terms of the statute, it is sufficient if the federal right is either "specially set up *or* claimed." For many years this court has followed the interpretation last suggested.

No particular form of words or phrases has ever been adjudged necessary in which the claim of federal rights must be asserted in the state court. It is sufficient if it appears from the record that such rights were either specially set up *or claimed* in such manner as to bring them to the attention of the state court and refer them to that court for decision.

California National Bank v. Kennedy, 167 U. S. 362–71, was a suit to enforce the liability of stockholders in a savings bank created by the laws of California. A national bank was alleged to be such stockholder and was adjudged liable, as such, by the state courts. The statement of the case prepared by Mr. Justice WHITE shows that the only averments in the answer claiming any right under the federal statute were:

"A demurrer to the amended complaint was overruled, and the California National Bank answered denying that it was ever the owner of any stock in the savings bank, and alleging that if any such stock was ever issued to it, it was issued without due authority from the bank in its corporate capacity and without authority of law. The answer also averred that the bank never acquired 'in the usual course of business or now has, as owner, any stock with the said defendant the California Savings Bank.'"

In holding this very general averment to be a sufficient foundation for the prosecution of a writ of error to review the question whether a national bank had, by the national banking act, power to hold stock in another corporation, Mr. Justice WHITE (*Ib.*) said:

"The answer averred that if any stock of the savings bank appeared to have been issued to the national bank, it was 'issued without authority of this corporation defendant and without authority of law.' In view of the fact that the defendant was a national bank deriving its powers from the Statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can in reason be construed only to relate to the controlling and governing conduct of the corporation, that is, the law of the United States."

In recognizing the fact that the supreme court of the state had itself specifically decided the question, to be controlling, the opinion states (*Ib.*):

"The supreme court of the state interpreted the case brought to it from the court below as presenting the question of the power of the corporation under the law of the United States to become a stockholder in a savings bank, for in the opening sentence of its opinion it says: 'The California National Bank, one of the defendants, has ap-

pealed upon the ground that by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it can not be made liable for any portion of the indebtedness of the corporation.'"

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530–40, involved the question of whether the rule of the federal courts controlled the state court as to allowance of attorney's fees on an injunction bond given in the federal court, where the action for its breach is brought in a state court. In holding in favor of the right of this court to review the judgment of the state court, Mr. Justice WHITE in the opinion, said:

"But it is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then, a federal controversy having been actually decided, the right of this court to review obtains. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 660. All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet

when a question is thus raised, and it is actually considered and decided by the state court, the right to review exists. *Mallett v. North Carolina*, 181 U. S. 589, 592.

"Now, it plainly appears that the Kansas City court of appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, *viz.*, that attorneys' fees are not a proper element of damages. We say this is undoubted, since the opinion of Kansas City court of appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock v. Mulrane*, 184 U. S. 497. True it is that the Kansas City court of appeals held, contrary to the rule announced in the *Tullock Case*, that the state court was not bound to apply the rule of damages prevailing in the courts of the United States, and in effect while so concluding decided that the claim that the bond should be enforced according to the rule prevailing in the courts of the United States involved no federal question; but the fact that the state court, whilst deciding the federal question, erroneously held that it was not a federal one, does not take the case out of the rule that, where a federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-federal in its character. The assertion that a federal right was not raised below is therefore without merit."

In *Swearingen v. St. Louis*, 185 U. S. 38–47, Mr. Justice PECKHAM, in an opinion denying jurisdiction upon the particular record, said (pp. 45–46):

"We do not hold that it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right or must have been in some way presented to the court."

In *Home for Incurables v. New York*, 187 U. S. 155–58, Mr. Justice HARLAN, after quoting the opinion in *Parmalee v. Lawrence*, 11 Wall. 36, to the effect that the conflict between the state law and the Constitution of the United States must "appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court," or "it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it," added:

"Later cases in this court have expressed the additional thought that if the highest court of the state assumes that the record sufficiently presents a question of federal right and decides against the person claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of federal right."

In *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 308–9, the CHIEF JUSTICE, while denying jurisdiction upon the particular record presented, said in the opinion:

"If the highest court of a state entertains a petition for a rehearing, which raises federal questions, and decides them, that will be sufficient (*Mallett v. North Carolina*, 181 U. S. 589); or if the court decides a federal question which it assumes is distinctly presented to it in some way. *Home for Incurables v. New York*, 187 U. S. 155; *Swear-*

ingen v. St. Louis, 185 U. S. 46. Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this can not be made out by resort to judicial knowledge."

In *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U. S. 58–82, Mr. Justice SHIRAS, expressing the opinion of the court in favor of jurisdiction on the particular record, said:

"But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court. 'The true and rational rule,' this court said in *Bridge Proprietors v. Hoboken Land & Improv. Co.*, 1 Wall. 143, 'is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' . . . If it appear from the record by clear and necessary intendment that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient."

In *Erie Railroad v. Purdy*, 185 U. S. 153, the opinion by Mr. Justice HARLAN, while denying jurisdiction upon the record before the court, said:

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the constitution or any treaty, statute,

or authority exercised under the United States, this court could review that judgment, *although no federal question was distinctly raised or insisted upon in the trial court.*"

In *Leigh v. Green*, 193 U. S. 85, Mr. Justice DAY in the opinion said:

"A motion is made to dismiss because the claim of impairment of a right secured by the fourteenth amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim theretofore made that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the 14th amendment to the Constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case, the question is reviewable here, although first presented in the motion for a rehearing. *Mallett v. North Carolina*, 181 U. S. 589."

In *Carter v. Texas*, 177 U. S. 841, it was said in the opinion by Mr. Justice GRAY:

"But the question whether a right or privilege claimed under the constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a state court is, itself, a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state."

Among many other cases in which this court held jurisdiction under section 709, where the record showed the federal right to have been first set up in assignments of

error, after judgment had been rendered in the lower court, are *Meyer v. Richmond*, 172 U. S. 81–101 (per Mr. Justice McKenna), and *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (per Mr. Justice Harlan).

It is needless to extend the references. The cases above referred to destroy the argument against jurisdiction presented by the brief of defendants. Under the rule of these cases, it is entirely certain and obvious that the present record involves an interpretation and construction of an act of Congress, and that the final judgment in the highest court of the state was against the contention of plaintiffs in error upon the rights claimed thereunder. It is not disputed that the plaintiffs in error were, in doing the precise acts charged against them as the foundation of the action, officiating as directors of a national banking association, and were discharging duties specially enjoined, and exercising powers expressly conferred, by an act of Congress. The answers in the court of original jurisdiction so alleged; and defendants in error, in attempting to make out their cases in the trial court, adduced documentary proofs to establish this fact. Since the National Banking Association was the creature of the act of Congress, and since that act created the offices of directors and defined their powers, duties, and liabilities, the issues made by the pleadings and proofs involved, essentially and necessarily, a determination of whether the liabilities of plaintiffs in error were governed by the act of Congress. And this question, inherent in the character of the issues made by the pleadings and proofs, was distinctly and definitely adjudicated by the supreme court of Nebraska. That court assumed that the proceedings taken by plaintiffs in error

were sufficient, under the rules of procedure governing its own practice, to raise the federal questions and refer them to the court for its decision. So the state court definitely decided the federal questions here presented, and its Chief Justice, finding these questions not only to have been raised sufficiently and decided in the state court, but to have been well assigned in the proceedings taken for their review, himself allowed the writ of error upon which the case is now pending in this court. The record exhibiting the facts recited confers jurisdiction upon this court to review the judgment, under the doctrine of the cases above cited.

It further appears by the record that the *trial* court definitely passed upon all of the federal questions claimed by plaintiffs in error and presented by the assignments of error to this court. In our original brief, we quoted sufficient of the answer to show the federal rights to have been claimed in the pleadings. The trial court, by instruction 7 (printed record, p. 30) stated the elements of plaintiff's cause of action, upon which plaintiff had the burden of proof, as follows:

"In other words, the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank, from time to time, during its existence, as by the plaintiffs severally alleged; to show that the plaintiffs, each for himself or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say, that the bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and ex-

tent as to impair its solvency. Given. Defendants severally except. S. H. Sornberger, Judge."

The above instruction definitely and entirely excludes the element of *scienter*. It is needless upon this record to distinguish and refine as to the character of proof admissible to show the element of scienter—whether by direct proof of defendant's knowledge of the falsity of the statement, or by proof of circumstances showing that, in the ordinary and usual course of business, defendant ought to have known—whether this element must be established by proof of actual knowledge of the falsehoods, or may be sufficiently established by proof of wanton recklessness and heedlessness of whether the statement was true or false. This is so, because the trial court definitely and entirely excluded scienter from the enumerated elements of the cause of action. The above omission of scienter from the elements of the cause of action is emphasized by instruction 9 (printed record, pp. 30–31) quoted in our original brief, directing the jury that it was not material whether the director had knowledge that the report was false.

On the other hand, the present plaintiffs in error, Thompson, Yates, and Hamer, joined in a request to the court to give an instruction embodying the element of scienter. The record of this request (printed record, p. 39) is as follows:

"Instructions requested by defendants Thompson, Yates, Hamer, and Walsh . . . 6. The jury are instructed that if you find from the evidence introduced in reference to any of the directors named in any one of such cases that such director *did not knowingly* violate any of the requirements of the national banking act under which he was act-

ing as such director, or acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant. Refused. Exception by J. W. Deweese for Walsh estate and the directors. S. H. Sornberger, Judge."

In the motion of Hamer's administratrix for a new trial (printed record, p. 45) and of Yates (printed record, p. 48) and of Thompson (printed record, p. 50) the 13th assignment directed to the trial court is: "The court erred in refusing to give instruction No. 6 requested by this defendant." Upon the foundation thus laid in the trial court, the petition in error of Mr. Thompson, addressed to the state supreme court (printed record, p. 7) contained the following assignment of error:

"7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, number 6th, wherein the duties and liabilities of directors of national banks was defined in accordance with the provisions of the national banking act."

Identical assignments are found in the petitions in error of Yates (printed record, p. 3) and of Hamer's administratrix (printed record, p. 5).

Again, the trial court, by instruction 16 (printed record, p. 33), defined and submitted to the jury the issue of negligence as follows:

"16th. You are instructed that proof that a president or cashier misappropriated or embezzled funds of the bank or falsified the books of account is not of itself sufficient to establish *actionable negligence against the directors* who

have not participated therein, but if such embezzlement, misappropriations, or falsifications are of such great extent and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man, then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement and falsifications. Given. Defendants severally except. S. H. Sornberger, Judge."

In the separate motions for a new trial by Hamer's administratrix (printed record, p. 46), Yates (printed record, p. 49), and Thompson (printed record, p. 51) the forty-first assignment is: "The court erred in giving the 16th instruction on its own motion to the jury, numbered 16." And in the several petitions in error, the fifth assignment (printed record, pp. 2, 3, 5, 7) is as follows:

"5th. The court erred in giving to the jury the 16th paragraph of its charge to the jury, numbered 16, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law, fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in sections 5239, and other sections, of the national banking act."

Thus we have read from the record that the assertion of the federal rights was specially set up and claimed in the trial court (1) by answer, (2) by proofs, (3) by requested instructions, (4) by exceptions to instructions given, and (5) by assignments of error in the motion for a new trial. These claims, upon the foundations thus laid in the trial court, were specifically set up and claimed in the petitions

in error directed to the supreme court of the state. The judgment of the state supreme court necessarily decided them, and the court expressed its views upon them adversely to the contention of plaintiffs in error; and finally, the chief justice, recognizing such questions to be inherent in the record and judgment, allowed the writ of error. If, upon such a record, this court can not, upon a writ of error, review the judgment of the state supreme court upon these questions, it may as well relinquish all appellate powers attempted to be conferred by section 709 of the Revised Statutes, and announce that it is without authority to maintain the constitutional declaration that the constitution, and the laws of the United States made in pursuance thereof, are the supreme law of the land, and that the judges in every state are bound thereby. On the above references, the repeated assertions, in the brief supporting the motions to dismiss, that the federal rights involved were not claimed at every stage of the proceedings had in the state court, are shown to be entirely unfounded, if not indeed uncandid. There is, therefore, no merit in the contention that this court is without jurisdiction, and it is clearly the duty of the court to consider the causes upon their merits.

III.

The decision of the state court does not rest upon any ground of local law sufficient in itself to sustain the judgment independently of the federal rights asserted.

We have already shown that the instructions of the trial court definitely eliminated the element of scienter from the cause of action. The verdict was responsive to the in-

structions. It does not, therefore, include a finding that plaintiffs in error knew the reports to be false, nor that defendants made any of the statements recklessly and without any heed as to whether they were true or false. The findings of fact embodied in a general verdict and, implied from it, are to be deduced from the issues shown by the record to have been actually submitted for the finding of the jury. The record here not only shows a failure to submit the element of scienter, but that the jury was directed affirmatively that the fact of knowledge was immaterial. The federal right claimed was that the statute made scienter a necessary element of the cause of action. In the state supreme court, whose judgment is under review, the issue was squarely presented that the judgment below was erroneous because it excluded the element of scienter, claimed by plaintiffs in error to have been made a necessary ingredient of the cause by the act of Congress. In order to sustain the judgment, the supreme court necessarily held against the contention of plaintiff in error upon the federal right asserted. The decision does not rest upon any mere rule of local law sufficient in itself to sustain the judgment, exclusive of the federal right asserted. The exclusion of scienter is the exclusion of the federal right.

In order to suggest that there were frauds alleged against plaintiffs in error and proved at the trial, sufficient to support the judgment, that were wholly outside of their official acts of attesting the reports to the comptroller of the currency, counsel for defendants have mentioned three items: (1) a postal card message of the cashier found in the printed bill of exceptions at page 195; (2) a published business card run in a newspaper appearing

in bill of exceptions at page 25; and (3) the averments in the petition that defendants had conversations with the plaintiffs in error in which the latter represented that the bank "was thoroughly safe and sound," and that, for all that appears in the printed evidence, these averments of oral representations may have been sustained by the proofs.

Let us examine the *first* suggestion referred to, which is made in the brief supporting the motions to dismiss at pages 28 to 31. On January 17, 1893, according to the testimony of Jones, the credit balance of the Jones National with the Capital National was upwards of $17,000. On that day, Jones ordered a remittance from this balance of $5,000 to the Chemical National Bank of New York. The postal card referred to is an acknowledgment of the receipt of this order of transfer on a printed form in use by the Capital National Bank and a report of the remittance made. The card reached the postoffice at 1:30 A.M. January 17. We are told by counsel in the brief that the bank failed in fact on January 19. In the ordinary course of business by mail, the New York remittance made from Lincoln would not reach its destination, particularly if it went through the New York clearing house, until after the suspension of the remitting bank. The suspension found this item in transit. As is always true in cases of the failure of a financial or commercial concern, payment of the items in transit is suspended, and banks to which they are sent refuse to honor them, because of the failure of the drawers. The bank that makes the remittance, in the ordinary course, charges up the item at the time it goes forward. The bank who orders the remittance made, in this case the Jones National Bank, credits its correspondent bank with the item specifically ordered transmitted. When the draft

or remittance which was in transit in this case was dishonored, the item was subject to be credited back, on the books of the Capital National Bank, to the Jones National Bank; and properly chargeable on the books of the Jones National Bank to the Capital National. The Jones National Bank, in the ordinary course of business, had credited this item in transit to the Capital National Bank, reducing the balance shown on its own books to upwards of $12,000. The dishonoring of the item of $5,000 left the real indebtedness $5,000 more than was shown by the books. In order to establish the real amount of the indebtedness to be $5,000 more than was shown by the balances on its own books, the Jones National Bank produced the original card and offered proof that the $5,000 item was not credited to its account in New York. Nothing more than what we have already stated is involved in this item of proof. The postal card was not the source of any credit. There was no pretense at the trial that it was the source of any credit or that it, in fact, embodied any false statement. It evidenced a mere attempted withdrawal by the Jones National Bank of funds *already on deposit*. The card itself was signed by the cashier, and there is no pretense that any of the other plaintiffs in error had the slightest knowledge of this detail of business. The evidence affirmatively shows that Mr. Thompson was then absent from the city. The suggestion of counsel, in the connection made, is simply ludicrous and foolish. Its characterization as an act by which the bank, through the connivance of the directors, obtained the money of the Jones National, "in no real different manner than had a burglar entered the Jones Bank with jimmy and dynamite," is the wildest delirium of actual madness.

We turn now to the *second* circumstance, the business card which is mentioned in the more pretentious brief by counsel who discuss the merits. This business card (printed evidence, p. 25) reads as follows:

"Capital National Bank, Lincoln, Nebraska. Capital $300,000. C. W. Mosher, President. H. J. Walsh, Vice President. R. C. Outcalt, Cashier. Directors: W. W. Holmes, D. E. Thompson, C. W. Mosher, R. C. Phillips, E. P. Hamer, C. E. Yates, A. P. S. Stuart. Acc'ts. solicited. Banks, Bankers and Merchants."

This general card was found printed in a separate place in one of the daily papers that contained a publication of the report to the comptroller of the currency. Under what theory it was received in evidence we cannot devise; but the only mention of it during the proceedings was merely as an insinuation that persons reading the published report in the newspaper might, elsewhere in the same paper, find the names of all of the directors of the bank. The card itself contains no statement of the resources or liabilities of the bank. It gives no item whatever affecting the bank, except to *correctly* state the amount of its capital stock. It must have been an odd situation that induced counsel to suggest that this item furnished proof of *false representations*, sufficient to sustain the judgment, on grounds outside of the *official* acts of the plaintiffs in error.

The *third* and last circumstance suggested, also in the defendants' brief upon the merits, is the allegation in the petition that the plaintiffs in error made oral representations to the defendants, and that because the whole voluminous record, including examinations of accountants

extending over a period of some weeks, was not printed in full, the printed record does not definitely show that the oral averments were not established by proof. This suggestion, however, we anticipated. (See original brief of Mr. Thompson, pp. 9–10.) The testimony of the officers of the several banks who are plaintiffs, and to whom the oral representations are alleged to have been made, is printed, as is also the testimony of Thomas Bailey, the individual defendant in error. These are the only persons, upon the face of the averments, who could have been influenced by oral representations, and they each testify definitely and unequivocally that they had no source of knowledge other than the published reports. Their testimony, printed in the record, definitely excludes the possibility of their having been influenced by any oral statements, and definitely excludes the making of any oral statements. Having already covered the point, it will not be necessary to restate the evidence. It is disappointing to find in briefs exhibiting marked ability on the part of counsel the want of candor developed by the suggestions last considered. These unfounded suggestions point, as an index, to the desperate means employed to obtain the judgments. They exhibit more zeal than candor, and can only detract from the argument.

IV.

The state court, in determining the sufficiency of the petition, declined to recognize the established rule of pleading, invoked here by defendants, which requires a specific statement of each act of fraud or neglect relied on.

Generally, the rules of pleading in actions of this character, whether the petition charges fraud and deceit, or neglect and malfeasance in office, requires that the precise acts of the defendants creating the liability be definitely and particularly set out. If the action be for fraud and deceit, the precise statements of the fraudulent acts must be set forth; if for neglect and malfeasance, the particular act or omission of the individual defendant by which improper acts of the corporation have been caused or permitted, must be set forth. Failure to comply with this requirement is generally regarded as a defect in substance and not of mere form. Prior to rendition of the present judgment, the Nebraska supreme court had recognized and applied the rule of pleading mentioned, in actions of this character (*Arnold v. Baker*, 6 Neb. 135; *Aultman v. Steinan*, 8 Neb. 113; *Clark v. Dayton*, 6 Neb. 201; *Tepoel v. Saunders County National Bank*, 24 Neb. 817; *Staley v. Housel*, 35 Neb. 164; *Crosby v. Ritchey*, 47 Neb. 924; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137; *Thomas v. Thomas*, 33 Neb. 373.)

The petitions in the present suits did not set forth or contain any particular representations alleged to have been made by Mr. Thompson, other than the report to the comptroller, of date December 28, 1886. Observance of the

above rule of pleading would necessarily have required a judgment on the pleadings and proof in favor of Mr. Thompson, because any cause of action upon the report of the year 1886 had long been barred by the statute of limitations when this suit was brought. Besides, on the theory of the petition, the report of 1886 had been superseded by new reports, made five times during each year, and the moneys originally deposited had been withdrawn long before the failure of the bank. The original report was not the source of any credit extended by plaintiffs to the Capital National Bank, represented by the deposits subsisting at date of suspension. Now the rule of pleading adverted to excluded all other statements mentioned in the petition, as other statements of like character, etc. The failure to plead the particular circumstances and to set forth the particular representations was, under that rule, a defect in substance and not in mere matters of form. The record shows that plaintiffs in error urged this rule of pleading against the sufficiency of the record of the trial court to sustain the judgment. The supreme court of Nebraska, in order to sustain the judgment below, was driven to the extremity of repudiating and denying the existence of the above stated rule of pleading which it had before enforced, in the long line of cases already cited. In this behalf, the court pursued precisely the same course as that pursued in respect to the element of *scienter*, which was not established by the proofs. Finding that a scienter was not shown, and that the directors, other than the managing officers, had acted in good faith without knowledge of falsifications, the Nebraska court, in order to sustain the judgment against the *innocent* directors of a national bank, definitely repudiated the well-established doctrine of the

common law and held that a scienter did not need to be proved. We now adduce the record proof that the Nebraska supreme court pursued the course above ascribed to it. In the written opinion delivered in this case (printed record, p. 93) the court, defining the elements of the cause of action, say:

"It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) that the defendants *published* the statements purporting to show the financial condition of the Capital National Bank *or participated* in the publication thereof; (2) that such statements were false; (3) that the plaintiffs severally relied upon said statements and believed them to be true, and were thereby misled to their injury."

The above definition of the elements of the cause of action definitely and entirely excludes scienter. The court determined that it was not necessary to offer proof that the directors had knowledge of the falsifications in the statements, or to show that they participated in their making or publication, in wanton recklessness or heedlessness of whether the statements were true or false. Elsewhere (p. 94) the court employed the language, many times already quoted in briefs of both sides: "We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case."

To the point that the Nebraska supreme court repudiated the general rule of pleading that failure to specifically set forth the allegations or wrongful acts relied on, is a defect of substance and not of form, we quote from the same opinion (printed record, p. 94) as follows:

"The defendants appear to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, *the remedy was by motion.*"

So the suggestion found in counsel's brief on the merits at pages 66 and 67, that specifications of the particular acts, in cases of this character, are required by correct rules of pleading in stating a cause of action for mismanagement and neglect, merely exhibits counsel's fine sense of irony. That such rule of pleading was recognized at the circuit in the district of Massachusetts in *Allen v. Luke*, 141 Fed. 694–97, is not material in this case. Upon mere questions of practice, the state court has final, and in this case has exercised, arbitrary authority. Its own holding in the opinion in the present suit that the want of specification in the pleadings is a mere matter of form, which can be availed of *only* by motion, is final and binding upon this court. On the present hearing, this court must test the sufficiency of the petition to raise the federal issue without regard to the rule of pleading which the opinion of the state court repudiates. Since the state court denied to plaintiffs in error the benefit of this rule, in order to affirm a judgment against them, the defendants can not be permitted to here urge, in their own behalf, the benefit of that same rule, which, if applied below, would have overturned the judgment in their favor.

V.

The element of scienter was definitely and entirely excluded by the Nebraska supreme court.

We shall now consider briefly the argument of defendants on the merits. We had not expected counsel to claim that the record, in any particular, showed the judgment to rest upon a finding that the plaintiffs in error, other than the president and cashier who were the managing officers of the bank, had any knowledge that any falsifications appeared in any of the reports, nor that any of the plaintiffs in error, other than such managing officers, participated in making or publishing any of the reports, in a manner exhibiting wanton recklessness or heedlessness of whether the financial statements were true or false. But since such assertion is found in the brief, we shall proceed to show definitely and certainly, by appropriate record references, that it is both unfounded and uncandid. At the threshold of this inquiry, we shall exhibit the theory of the liability of plaintiffs in error, as embodied in the instructions of the trial court to the jury. At request of the plaintiffs below (defendants here) the trial court gave two instructions, the record of which (printed record, p. 34) is as follows:

"1st. A director or executive officer of a national bank is responsible for the making and publication of a false report of its financial condition, though he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a national bank is presumed to know its true condition and that the law requires true statements of its affairs to be made and published by the bank from time to

time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have a knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence."

"2d. The jury are instructed that inasmuch as the law required that all reports made by a national bank to the comptroller of the currency shall be published *at the expense of the bank*, in a newspaper at the place where the bank is established, you have a right to consider such published report as having been introduced in evidence in this action purporting to have been signed, and whose name appears in such published reports, as having [been] authorized by such defendants, so appearing to have signed the same. Requested by plaintiffs. Given."

Instructions 10, 11, 12 and 13 of those given to the jury by the trial judge of his own motion (printed record, p. 31) are as follows:

"10th. The director of a bank who *publishes*, or *participates in the publication* of, a report of its condition, by such acts asserts that the statements contained in such report are substantially true, and he can not rely upon his ignorance of the true condition of the bank as a defense to an action, when he in such published report represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless, or its liabilities so much greater than its assets as to render the bank insolvent."

"11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it being required of the bank and its officers and directors that such statements should be verified by the oath of the president or the cashier, and attested by at least three of the board of directors; consequently it was not necessary in any one re-

port for each or all of the directors and officers of the bank either to sign or verify such published statement. And in the particular case of the defendant H. J. Walsh, who was, as before stated to you, vice-president of said bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

"It is alleged in the several petitions, however, that each and all of said defendants at divers and sundry times, either as officers or directors, made out, signed and published, or caused to be made out, signed and published, the statements in question.

"You are instructed in that behalf that it is not necessary in order to create a liability of any of the defendants, for the plaintiffs to show that any such director or officer actually with his own hand signed and caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director *participated* in making and publishing the said statements."

"12th. In determining whether or not the defendant directors or officers did in fact *participate* in any or all of the statements alleged, or shown to have been put forth and published, besides considering any testimony, if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of time such officer or director had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements."

"13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet

if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the city of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and was not absent from home, that is, absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank."

In the face of this record, it required some hardihood on the part of counsel to assert that the plaintiffs in error, other than the managing officers of the bank, were held liable by the proceedings in the state court only because of having certified as absolutely true, of their own knowledge, the truth of the statements made to the comptroller of the currency. By each one of the above quoted instructions, the trial court definitely eliminated the requirement that any of the directors should have actually signed or attested the statements. The fact definitely stated to constitute the director's liability was merely that he should have "participated in the publication of a report," although it may have been signed and verified by others and did not bear his name. That proposition is embodied in the tenth instruction quoted. In the eleventh instruction quoted, the jury was told that it was not necessary for plaintiffs to show that any such director either signed the report or caused it to be published. Participation, presumed from the holding of the office, was all that was required. By the twelfth instruction quoted, the jury was given liberty to determine the fact of any participation in publishing such reports from a consideration of the length of service of the

officer, and his opportunity for knowing that such statements were made and published. By the 13th instruction quoted, the jury was directed that if "any particular director or officer of said bank did not himself directly cause to be issued and published the statements," etc., yet the jury might still inquire whether, when the statement was published, the director was a resident of the city of Lincoln and in a condition of health to attend to business, and use such facts to determine against the director the issue of whether the "director knew of and participated in the issuance and publication of any or all of the statements of the condition of the bank." By the first instruction given at request of plaintiffs below, above quoted, the jury was directed that a director "is responsible for the making and publication of a false report of its financial condition, tho he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof." This language was followed in the same instruction by the direction, "If one has been a director or executive officer of such a bank for a long period of time, he is presumed to have a knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence." The fact of actual attestation is everywhere definitely excluded as a ground of liability.

The proofs were that Dr. Hamer attested but a single report of date September 25, 1891, and that Mr. Thompson attested but one of the reports set out in the petition, dated in 1886, and but three others, which dated back many years before the failure of the bank. In the long term of service of these officers extending over a period of some nine years one of them attested a solitary report and the other four

reports, averaging one report in a period of more than two years. The law required the making of at least five such reports to the comptroller during each year. H. T. Jones, testifying as the managing officer of his bank, said he received the reports "as soon as published and the mails would arrive here from Lincoln" (printed evidence, p. 193). Without here giving references, the testimony of the other plaintiffs was to the same effect. So these plaintiffs, who kept their eyes trained on the official reports as they were issued from time to time, scrutinizing them as soon as they fell from the press, and who based their future dealings upon the condition of the bank shown by each new report, must have taken notice of any changed conditions shown therein. Each published report supersedes the prior reports. Not one of the plaintiffs claims that, in determining whether he should continue his deposit in the Capital National Bank, he looked to the antecedent reports. The proof is to the contrary. It was necessary in order to justify recovery to hold the present plaintiffs in error responsible for reports not attested by them and in the making of which they did not participate. It was further necessary, in submitting the case to the jury, to so define the rules of liability as to exclude any requirement to prove that the plaintiffs in error, who had not executed the later reports, had knowledge of any falsifications contained therein. By the testimony, if credit is given to the zealous statements of interested witnesses, the latest report, as it arrived, was the source of continuing credit, and necessarily the last report must have been the source of the credit evidenced by deposits subsisting at time of suspension. To meet these difficulties in the way of plaintiffs below, the jury was directed that a "participation" in the *publication*

of the report was sufficient to hold the non-attesting directors responsible. To make a finding by the jury of such *participation in the publication probable,* the plaintiff offered the *second* instruction above quoted, informing them that the banking act required that the reports made to the comptroller of the currency "shall be published at the expense of the bank." So it is simply untrue to state that the record shows any of the plaintiffs in error to have been held liable on the theory that any specific report, actually attested by him, was the means of deceiving the defendant in error into extending the particular credit evidenced by the deposit subsisting when the bank failed. The record references given to the instructions show the fact to be directly to the contrary. The entire argument, presented here by the brief of defendants, rests upon false premises and patent misinterpretations of the record.

Having thus recalled the particular issues raised by the record, and shown that the argument of defendant is based upon a false assertion as to the character of the issues and the rules of liability applied by the trial judge, and approved by the supreme court of the state, we shall now show that the state court did not rule in harmony with the theory that a scienter might be proved in the manner suggested in defendant's brief, and that it did not purpose or intend so to do. The holding of the state supreme court is directly to the contrary, that proof of a scienter need not be made in any form or manner. The Nebraska court held flatly that proof of guilty knowledge or wilful participation in the wrong, or any recognized equivalent of direct proof of that element which we term scienter, is not required in that state to make out a cause of action for fraud or deceit. This assertion can not be the subject of reason-

able or fair disputation, if tested alone by the present record.

The language of the state supreme court's opinion, already quoted, which defines the elements of the cause of action (printed record, p. 393) definitely excused the defendants in error from proving that plaintiffs in error had knowledge of any falsifications in the reports, or knowingly participated in any fraud, or proving any recognized equivalent of such facts. The opinion held, as already pointed out, that the plaintiffs in error did not know the statements to be false. In this respect, the holding of the supreme court was merely an approval of instruction 7 (printed record, p. 30) which also excused plaintiffs below from proving the same facts; and of instructions 10, 11, 12 and 13 given by the court on its own motion, and instructions 1 and 2 given at request of plaintiffs below (printed record, pp. 31, 32, 34), all of which in terms restricted the burden of proof, upon this element, to mere proof of participation in the publication of reports. In reaching the conclusion that the cause of action did not embody the element of *scienter*, the opinion of the supreme court, as already pointed out, referred to and followed the prior holding in *Gerner v. Mosher*, 58 Neb. 135–60, which flatly held that proof of a scienter, in any form, was not essential and was wholly immaterial.

But defendants in their brief urge (pp. 37–38) that the employment of the term *scienter* in the opinion that case, "was a mere obiter;" and that the doctrine at the foundation of that decision is consistent with the general rule requiring guilty knowledge and participation in the fraud, or its legal equivalent, to be alleged and proved. To support this position, reference is made to the article of Prof.

Lee in 20 Cyc. 26. In the footnote, from which defendant quotes, Prof. Lee, in the article referred to, gives the following exposition of the isolated holdings of the Nebraska court:

"In Nebraska it has frequently been said to be the settled law of the state that if the representation is false, and is relied upon by the plaintiff to his injury, defendant's knowledge of the falsity is immaterial and need not be proved, the courts apparently considering that the rule requiring a scienter to be shown was not in force there. And this statement of the law was deemed applicable, of course, whether the fraud was made the basis of an action or was set up by way of recoupment or counterclaim in an action to enforce a contract." (Citing the cases, including *Gerner v. Mosher*, 58 Neb. 135.)

The note then proceeds (20 Cyc. 26):

"It is doubtful, however, whether the court intended entirely to abrogate or disregard the rule requiring a scienter."

It then contains the excerpt quoted by defendants, suggesting a means of reconciling *Nebraska's discordant cases* with the general rule asserted in the text, citing the minority opinion by IRVINE, C., in *Gerner's case*, and the original Nebraska case of *Phillips v. Jones*, 12 Neb. 213, and concludes: "If this explanation is correct, the Nebraska decisions are not inconsistent with the rules of the text." Let us then determine the question by further reference to the decision of *Gerner v. Mosher* (58 Neb. 135), referred to and followed in the opinion in the case under review.

In *Gerner v. Mosher*, 58 Neb. 149, Commissioner IRVINE said:

"It is true that it has been frequently held in this court that in an action for false representations it is not necessary to aver or prove a scienter. . . . But it does not follow that one making a statement is charged absolutely with the consequences of its falsity in fact, regardless of the form of the statement and the circumstances under which it is made. Indeed, in the cases cited, the language used in one and implied in the other, is that one is liable for the consequences of the false statement only when it is made as a positive representation of an existing fact. In *Moore v. Scott*, the statement was qualified by the persons making the representation giving the source of his information as 'a reliable person' and stating his belief on that ground, and it was held that he was not responsible thereby for the truth of the ultimate statement, but only for the truth of his receiving such information from a reliable person. . . . Following the case cited (*Briggs v. Spaulding*, 141 U. S. 132), the circuit court for the northern district of New York has held that where the affairs of the bank were managed solely by the cashier, who was reputed and universally believed to be honest and capable, directors who knew little of the business of banking were not guilty of negligence because they failed to examine the books, there being no grounds of suspicion known to them (*Warner v. Penoyer*, 82 Fed. Rep. 181). This being the rule of duty imposed on national bank directors, we think it follows that where a director attests a report he does so as a director and with a view only to such knowledge of the condition of the bank as the exercise of his duties as a director imposes upon him."

Commissioner IRVINE, from whose opinion we have quoted, was not a member of the Nebraska supreme court. By the Nebraska constitution, that court is composed of three judges, of which the member whose term of service first expires is the Chief Justice. The duties of Commissioners, appointed to relieve an overcrowded docket, were *advisory* only. At page 149 (*ib.*), IRVINE, C., pointed out

that the court was against this view, which was concurred in only by his fellow-commissioner RYAN. The authoritative opinion of the court, delivered by NORVAL, J. (*ib.* 152), opens with the statement that the court does not concur in the proposition expressed by IRVINE, C., which we have already quoted. While numerous authorities are referred to and reviewed, in the opinion of the court upon this narrow question, by NORVAL, J., the gist of the holding is comprehended in the following paragraph (*ib.* 156):

"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank or who purchased stock of the corporation in reliance upon the truthfulness of the contents of these reports *were as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false.* That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a *scienter* is not necessary to a recovery. This court has frequently asserted that to maintain an action for false representations it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor."

In the views expressed in the foregoing paragraph, all the judges concurred (*ib.* 160). That doctrine was therefore unanimously adopted by the court. The ground upon which *scienter* was excluded was that the consequences to the plaintiff were the same, in cases where the defendant

acted honestly, as in those cases where his conduct had been fraudulent. To quote the language of NORVAL, J., defendant was "as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false."

Having held briefs in the *Gerner's case*, we are familiar with the pleadings. The report of that case (58 Neb. 139) shows that each count in the petition depended upon the making of a single specific statement, which was set out in full. In that suit, plaintiff complied with the general rule of pleading which the state court in this suit repudiated. Plaintiff there relied upon the last published report preceding his purchase of stock of the bank. The judgment there entered was a dismissal as to the directors occupying the relation to the reports relied on which is occupied in this case by plaintiffs in error, Hamer and Thompson. There was a singleness and directness of issue presented in *Gerner's case* which is entirely wanting here. Here the doctrine of *Gerner's case* has been expanded so as to condemn directors in a situation which required their dismissal, under the holding in *Gerner's case*.

VI.

Section 5239. Revised Statutes of the United States, prescribes the civil liabilities enforcible against national bank directors for official acts done contrary to the requirements of the national banking act.

The legal issue, whether section 5239 prescribes the civil liabilities incurred by directors because of official acts done contrary to the requirements of the national banking act, is definitely raised by the record. The antecedent refer-

ences establish that such issue was raised. The rule of liability created by the section referred to, as claimed by the plaintiffs in error, was denied by the highest court of the state. The record refers that question to this court for decision. In deciding that question, the mere form of the remedy available is not a material consideration. It may be conceded that the liability imposed by the statute is enforcible in a common law action of deceit. It may further be conceded that in the forum selected in the present suits the local interpretation of the common law excludes the element of the directors' *knowledge*. But existing rules of the common law do not restrain the powers of Congress. When legislating in respect to official acts of the officers of an institution of its own creation, Congress had power to change the substantive rules of liability recognized by the common law, and to write into the ancient cause of action for deceit the element of *scienter* requiring proof of the director's knowledge and wilful participation. The legal issue here raised pertains to the substantive law defining liability which must control the decision, whatever remedy may be available for enforcement of that liability. This review of the record leads back to the propositions discussed in the original briefs of plaintiffs in error. The superficial and insinuating suggestions made in the brief of defendants have been dissipated by the light which the record itself reflects, and the points originally discussed are again exposed for the court's determination.

In determining the issue touching the application, interpretation, and controlling force of the act of Congress, we do not regard the present interpretations of the rules of the common law governing actions of deceit as important.

The vital consideration is as to whether the federal statutes apply. If section 5239 (Rev. St. U. S.) applies and governs and controls the liabilities of the plaintiffs in error, it must be conceded on the face of the record that no rational interpretation of the language of that section will permit the judgments to stand. In our original brief we referred to the rule of the common law, in force at passage of the national banking act, merely as an aid to interpretation of the language used in section 5239. Prior to passage of the national banking act, this court in *Lord v. Goddard*, 13 How. 211, distinctly held that the action of deceit could not be sustained "without proving actual fraud in the defendant, or an *intention to deceive* the plaintiff by false representations;" and further that, "the simple fact of making representations which turned out not to be true, *unconnected with a fraudulent design*, is not sufficient." It was, therefore, to be expected that Congress, in establishing civil liabilities against the directors of these associations of its own creation, should preserve the elements of knowledge and wilful participation in the wrongs made the basis of the cause of action. This court is at liberty to alter its expressed interpretations of the common law rules, but is without power to amend a statute or erase from it unambiguous words controlling its interpretation. A statute, once enacted, retains its force till modified or repealed by Congress.

We note, however, that a large proportion of the references given by defendant are quotations of inflammatory rhetoric employed by *nisi prius* judges, whose utterances are not authoritative, either to establish or declare the rule of the forum. The cases referred to may, as a class, be said to be exceptions to the rule generally recognized, and

are in direct conflict with the rule of this court established in *Lord v. Goddard*, 13 How. 211, and since adhered to, preserving the element of *scienter* in actions of this character. The text writers recognize the Nebraska cases as discordant and out of harmony with the general rule applied by the courts employing the English language. It would be easy to overcome the references found in the brief of defendants by collating and reviewing the decisions supporting the generally recognized rule, without going outside of the cases cited by Prof. LEE in his article on *fraud* (20 Cyc. 24, etc.), to which both parties to this suit have made reference. But since the reliance of plaintiffs in error is upon the *statute*, such course would merely cumber the argument. We shall, therefore, hold to the argument based upon the federal statute.

A most superficial and shallow argument offered by defendants against the application to the case of section 5239 (brief, pp. 48–49) is that neither the making of false official reports to the comptroller, nor the publication of false official reports violates any provision of the national banking act. Therefore, counsel argue, since the liabilities imposed by section 5239 are consequent upon acts violative of some provisions of the title, it is not applicable to a cause founded upon the making of false official reports to the comptroller. That suggestion is strikingly discordant and inconsistent with the interpretation of the national banking act held by the state court, of which defendants had the benefit at the trial. The trial judge, *at defendant's request* (instruction 1 requested by plaintiffs below, printed record, p. 34) directed the jury that, "a director of a national bank is presumed to know . . . that the law requires true statements of its affairs to be made and

published from time to time." Having contended for and procured such interpretation to be given by the trial judge to the jury, it would seem that defendants should hardly be permitted to urge the contrary view at this time. However, the instruction quoted seemed to follow closely, and almost literally, the interpretation placed by this court on section 5211 in *Cochran v. U. S.*, 157 U. S. 286, holding that the duty of making and publishing the report is imposed upon the association itself. Section 5211 enacts that "every association shall make to the comptroller of the currency not less than five reports during each year . . . verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors." Elsewhere in the brief, defendants contend for a very rigid interpretation of the provisions requiring the association to verify its reports as true.

The above provisions requiring the making of true reports by the association, verified as such in the manner prescribed, is supplemented by the additional provisions contained in sections 5209, making it an offense punishable by imprisonment from five to ten years to make any *false entry* in such report. Criminal liability for falsifying the report, contrary to the requirements of section 5211, is by section 5209 visited only upon the person actually making the false entry. Civil liability against the director, who knowingly participates in or assents to the falsification, as contradistinguished from the *act* of making the falsification, is imposed by section 5239. The act is thus complete and harmonious as a whole, and creates and defines the liabilities, both criminal and civil, resulting from the felonious making of the falsifications, or knowingly or wil-

fully permitting them to be made. In urging this interpretation we are by no means taking the initiative. Such is the interpretation long since placed by this court upon these various provisions of the national banking act. The following cases definitely settle this question of interpretation.

In *Cochran v. U. S.*, 157 U. S. 293, it was said in the opinion by Mr. Justice BROWN (in our first brief accredited through error to Mr. Justice WHITE):

"The argument of defendants assumes that the making of the entry and the making of the report are the same thing, whereas, in fact, they are wholly different. By section 5211, the report must be made by the *association*, and must be verified by oath or affirmation of the president or cashier and attested by the signature of at least three of the directors. But under section 5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association; and that penalty is applicable to any officer or agent of the bank who actually makes the entry with intent to injure or defraud, or to deceive any agent appointed to examine the affairs of any such association."

The case quoted from holds merely that section 5209, prescribing criminal punishments, does not cover mere acts of verifying the published reports which are false, in contravention of the requirements of section 5211 that the reports made shall be verified as true and then attested by three directors. The penalties attaching to the directors for knowingly permitting the verification of reports which are, in fact, false, are prescribed by section 5239, and are civil liabilities, and not criminal punishments. In the

opinion of Mr. Justice BROWN quoted, reference is made to the opinion of Mr. Justice WOODS in *U. S. v. Britton*, 107 U. S. 655–70, which considers the several sections of the national banking act and interprets them together, and definitely explains the force and operation of section 5239.

In *U. S. v. Britton*, 107 U. S. 667–68, Mr. Justice WOODS, in the opinion, reviewing and interpreting the provisions of the national banking act under consideration, said:

"The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds. If we hold these counts to be good, then every official act of any officer, clerk, or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable under section 5209. For instance, section 5200 of the Revised Statutes declares that 'the total liabilities to any association of any person, . . . for money borrowed, . . . shall at no time exceed one-tenth part of the capital stock of the association actually paid in.' Section 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk or agent of a banking association who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds.

"So, by section 5137 of the Revised Statutes, the purposes for which a banking association may purchase and hold real estate are limited and specifically pointed out. If the directors of a banking association should authorize the purchase of a piece of real estate for its use, but not for purposes authorized by the statute (even though with intent to injure some corporate body or natural person), it could hardly be claimed that the directors who made the order, and the other officers or agents of the association who (with a like intent) had any hand in making the purchase or in

paying out the money of the bank therefor, would be liable to indictment and imprisonment under section 5209.

"The acts charged by the counts under consideration are precisely of the same character as those just mentioned. They are acts of maladministration of the affairs of the association by its officers. The penalty for such acts is prescribed by section 5329, which declares: 'If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title (national banks), all the rights, privileges, and franchises of the association shall be thereby forfeited. . . . And in case of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity, for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

"We are, therefore, of the opinion that the wilful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person."

It, therefore, appears to be settled by the definite interpretations found in the decisions of this court, above quoted, that it is the office of section 5239 of the Revised Statutes to prescribe civil penalties against the directors for acts which are violative of any of the provisions of that title; and that where criminal punishments are not elsewhere prescribed, section 5239 necessarily prescribes the only liability imposed upon the directors for official misconduct amounting to violations of any provisions of the title. The decisions referred to definitely and fully sustain the argument presented in the original briefs, that to entitle a

depositor in the association to recover in this case against the directors, other than those who actually made the false entries in the reports, the depositor must show that the director did the act knowingly or knowingly permitted the falsifications to be made. To sustain the judgment, the record should show that the trial court, by appropriate instructions, imposed this burden upon the depositor. Since the record in the present case shows to the contrary, the judgments must be reversed.

The present suit involves questions touching the powers, duties, and liabilities of directors in a corporation created by an act of Congress (per SWAYNE, Justice, *Bank v. Dearing*, 91 U. S. 33), "to aid the government in the administration of an important branch of the public service." And "being such means," says Mr. Justice SWAYNE, "brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'"

In *California National Bank v. Kennedy*, 167 U. S. 366, 367, it was said by Mr. Justice WHITE:

"It is settled that the United States statutes relative to national banks constitute the measure of authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 73. . . . It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exch. Bank*, 92 U. S. 128."

Congress imposed on the association by a mandatory statute the duty of making the reports to the comptroller of the currency, and of verifying them, in the manner stated, *first*, by the oath of a managing officer, and, *second*, by attestation of three of the directors. As the trial court instructed the jury, this statute required the making of *true* reports. Having imposed these official duties, the statute, by section 5239, very properly described the penalties, in form of civil liabilities, consequent upon their violation. The application of the statute seems hardly a debatable question. Counsel who characterize this as a "novel theory" must be so provincial as not to appreciate the functions and powers of the national government.

In this connection, we disavow any imputed claim that the validity of ordinary contracts which national banks are authorized to make depends upon the federal statute. On the contrary, we concede that the general rules governing right of property are not infringed by the national banking act. The largest share of the bank's operations are, no doubt, governed by the local laws of the states in which they do business. But the federal statutes *alone* determine whether an act of the bank is *ultra vires;* how its assets are distributable in case of insolvency; and what are its powers and public duties, and the powers, duties, rights, and liabilities, civil and criminal, of its officers. (*McClellan v. Chipman*, 164 U. S. 164; *Davis v. Savings Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220.)

In addition to the enumerated instances in which the provisions of the federal statute are controlling and exclusive, it is also settled that where the federal statute contains any regulation requiring observance of local laws in respect to general contracts, such as the exaction of

usurious interest, and fixes a penalty for non-observance of such regulations, its provisions are exclusive (*Bank v. Dearing*, 91 U. S. 29). The federal statute is paramount, controlling, and exclusive, in so far as it speaks affirmatively, in relation to the general contracts which are ordinarily governed by the laws of the states. In respect to the corporate powers and the duties of the officers, the federal statute is the *measure* and the sole *source* of authority, implying a prohibition where an authority is not expressly granted. Under these well-settled rules the application of the statute to the present controversy can not rationally be denied.

In *McClellan v. Chipman*, 164 U. S. 356–57, Mr. Justice WHITE reiterates and harmonizes the rules above asserted. In the opinion in that case, he said:

"Two propositions have been long since settled by the decisions of this court:

"First. National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and the liability to be sued for debts are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *First Nat. Bank v. Kentucky*, 76 U. S., 9 Wall. 362.

"Second. 'National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national

legislation, or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.' *Davis v. Elmira Sav. Bank*, 161 U. S. 283 (40:701).

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

The learned and accurate exposition by Mr. Justice DAY of the law that a shareholder has the right, for a legitimate purpose, to examination into the affairs of the business in which he is part owner, and his right of discovery of the methods in which his agents are conducting his own business, found in *McGuire v. Blount*, (199 U. S. 148-59) to which we are cited by defendant, does not contravene any principle here urged. That decision involved a right of property, the right of an owner to dominion over his own property, and to participate, within reasonable limits, in the conduct of business in which he is part owner. That right, under our system, is sacred and declared by the constitution to be inviolable. It is maintained by the opinion on high grounds; but the opinion definitely recognizes every principle contended for here by plaintiffs in error, and is an authority to support their contention. Instead of contravening the act of congress, the opinion definitely asserts its supremacy. At page 159 (*ib.*) Mr. Justice DAY said:

"That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice, to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers, as the terms are used in the statute, it would belong to that class 'vested in courts of

justice' which are *expressly* excepted from the inhibition of the statute."

VII.

Mr. Thompson's testimony is fully and correctly stated in his own brief.

The effort in defendant's brief (pp. 96–111) to exhibit Mr. Thompson's testimony in a discrediting light hardly merits rejoinder. Wherever the record shows him to have detailed the full and complete circumstances of each transaction inquired about, so as to establish in each case its integrity, an ellipsis is used in the brief to obscure and hide the details related and explanations given. After employing this art, counsel pretends to lay naked facts together in such a way that, without explanation, they would tend to discrediting inferences. This garbled exposition of his testimony amounts merely to misrepresentation. The same testimony is fully exhibited in Mr. Thompson's own brief (pp. 9–25). The only difference in the manner of laying it before the court is that Mr. Thompson includes details which in each case, the defendant marks with an ellipsis. Mr. Thompson's brief reverts to every insinuating interrogatory and gives the detailed answers, which wipe out the insinuations. The court may trust either the record or the statements of Mr. Thompson's evidence embodied in his own brief, but will find itself obliged to discredit the garbled and insinuating exhibit furnished by the defendants.

The issue, however, as to the ultimate facts established by Mr. Thompson's testimony can hardly be regarded as vital to the decision. It will, doubtless, be sufficient, upon this hearing, that the state supreme court found, upon his

evidence, in favor of his personal integrity. His evidence was exhibited in his own brief merely to show the judgment in an aggravated light. The controlling consideration here is that Mr. Thompson was entitled to have his liability tested by the rules prescribed in the act by Congress. That right was denied to him by the state courts, and he is entitled to have the judgment reversed because of that error, without regard to whether this court might conclude his testimony sufficient to have justified a submission of the cause to the jury under a proper definition of his liabilities.

VIII.

The rule of liability which preserves the element of scienter does not contravene established doctrines of public policy.

Where liability is governed by statute, the rule of public policy at its foundation is purely a legislative question with which the courts have no concern.

The repeated assertions in the brief of defendants to the general effect that preservation of the element of scienter tends to recklessness and faithlessness on the part of directors in the discharge of official and administrative duties, that such rule leaves innocent and confiding depositors and creditors without redress for wrongs suffered, and that it will tend to weaken public confidence in national banks and lessen their efficiency as public agencies, have only the force which nervous rhetoric and passionate oratory lends to a questionable and doubtful cause. Their employment may appeal to the superficial sensibilities, but they are not deep enough to reach or persuade the deliberate judgment. Like most all mere rhetorical flourishes, they may be paraphrased and made to apply to either side of

the argument. The rule urged by plaintiffs in error does not, in fact, operate to deny depositors and creditors of redress. On the contrary, it affords them redress, but requires them, in conformity to correct ideas of business morals, to seek their redress against the wrongdoers who actually perpetrated the frauds of which they complain. Where one innocent person is defrauded, no corrective or stimulus to good business morals is offered by permitting him merely to shift his loss to another innocent person. To pursue the later course would tend only to demoralize business methods, since no man could then know that the conscious rectitude of his own conduct would afford any vindication against a charge of fraud. Let us inquire, then, what has been the policy of Congress and how well that policy has sustained this banking institution of its own creation.

In analyzing the provisions of the national banking act, the following facts will determine the policy adopted by Congress: (1) Faithfulness to official duty on the part of officers and directors of national banks is afforded by imposing penalties only upon the delinquent official. Conscious participation in or wilful assent to the violation of some provision of the banking act is, by section 5239, made the sole cause for imposition of civil penalties or civil liabilities. The policy at the foundation of the criminal punishments imposed by section 5209 is also to visit the punishment solely upon the particular officer guilty of official delinquency. This is well shown by the decision in *Cochran v. U. S.*, heretofore cited and quoted. (2) The associate officers or directors in the same institution with the guilty delinquent, who have not knowingly participated in or consented to the unlawful act, are as definitely, by

the same statutory provisions, relieved of all the penalties consequent upon any unlawful act. (3) The seventh subdivision of section 5136 authorizes national banks to exercise, by their "duly authorized officers," such powers as shall be necessary to carry on the business of banking. The oath of office of the director, prescribed by section 5147, in so far as it refers to administration of the affairs of the bank, is qualified by the clause, "so far as the duty devolves on him." If we understand the history of the statute correctly, the quoted clause was added in 1874.

So it is apparent that Congress deemed visitation of punishments upon the guilty officers, alone, to be a sufficient stimulus to official duty. Congress, doubtless, considered also that men of affairs and character would be free to embark their capital in such enterprises and assume official positions under regulations which exempted them from criminal punishments or civil forfeitures, so long as they did not knowingly violate any of the provisions of that act. The public policy to be pursued in the enactment of this statute creating this public agency was wholly legislative. Congress had power, either to adopt the policy shown, or to embody in the act the dragonian policy here urged by the defendants. After enactment of the statute, it was the privilege of Congress to observe the efficacy, or want of efficacy, of the policy adopted in the original act, and to amend or alter it in any respect in which the test of experience had shown it to be deficient. Time has demonstrated that the enactment adopted is wise and prudent. The legislative policy adverted to has led men of affairs and prudence to invest largely in the stock of national banking associations and to enter their directory, so that

the act itself has developed, probably, the greatest and most efficient financial system in the world.

It must not be overlooked, in this connection, that the innocent depositors and creditors were not lost sight of by Congress. They were given specific and special remedies against such officers as knowingly violated the provisions of the title to their damage, and a sacred fund, set apart for their exclusive use, in the extreme and occasional cases of insolvency, was provided by assessments upon all the stockholders equal to the amount of the capital stock, which, in ordinary cases, would reach solvent debtors other than the adventurous officers, who, in many instances, are ruined by the failure of the bank. Congress provided an agency for the speedy collection and distribution of this fund.

The questions discussed in our original briefs are, therefore, controlling and decisive of the case, and their application to the record will require a reversal of the judgment.

Respectfully submitted,

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HALLECK F. ROSE,
Counsel for Plaintiffs in Error.

Lincoln, Neb., March 1, 1907.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
JONES NATIONAL BANK, *Defendant in Error*. } No. 230.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
UTICA BANK, *Defendant in Error*. } No. 231.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
THOMAS BAILEY, *Defendant in Error*. } No. 232.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
BANK OF STAPLEHURST, *Defendant in Error*. } No. 233.

SOME NEW REFERENCES.

We desire to call attention to a case not heretofore referred to, that of Utley v. Hill, 155 Mo. Rep. 274, where the court considered the liability of directors of a State Bank, based on a report to the Secretary of State, which

report had been made by the Banking Association as required by a State law.

The question involved was whether the directors in attesting the report could be held liable to a depositor in a common law action for deceit, on the charge of false statements.

The court, in considering this question used the following language, page 274:

"Before the enactment of this statute there was no obligation on directors or officers of a bank to make any kind of a statement of the actual condition of the bank to the Secretary of State or to any one else nor to publish any such statement in the newspapers. The obligation and duty so to do was created by the statute. The same act which imposed the duty prescribed the penalty for its violation and the tribunal before which the penalty should be enforced; that is, made it a misdemeanor, punishable on information or indictment, by fine and imprisonment. The conclusion is inevitable and unavoidable that no other penalty can be exacted or enforced than that prescribed by the act. Nor can a false statement made by directors of a bank to the Secretary of State be made the basis of a common law action for deceit. The reason is plain. The law exacts the statement; hence it is not voluntarily made. The statement is required to be made to the Secretary of State, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common law action of deceit cannot be predicated upon it. But, above all, the law imposes the duty and prescribes the punishment for a violation thereof. The law vests no right of property or of action in any one which may be vindicated by the common law, and therefore the penalty imposed by the law is exclusive and no other remedy is open to any one."

In the oral argument of these cases there was an inquiry

from the bench, whether or not the petitions sufficiently stated a cause of action for fraud and deceit under the system of pleading in Nebraska. No particular form of pleading is required in Nebraska, other than a plain statement of facts, and we think there is no doubt that sufficient facts are alleged in the petitions to embrace a cause of action for fraud and deceit, if such allegations be segregated and construed separate and apart from the allegations of negligence and misfeasance charged against the directors of the bank. Clearly there is one cause of action for misfeasance and mismanagement alleged, and if there is another for fraud and deceit it is not separately stated and numbered as required by the Nebraska Code, but all of the facts "jumbled together" in one general averment. The rule of pleading is that a pleading will be construed most strongly against the pleader.

If the petitions are to be construed as actions for fraud and deceit it must be in face of the fact that the petitions disclose an action for negligence and misfeasance in office, as well as the fact that the cases were tried and submitted to the jury by the instructions of the court on the theory of negligence and misfeasance in office, and also on the theory of deceit. It cannot be said that the jury did not decide against the directors by reason of these instructions and the proof on questions of negligence in the management of the bank.

If the actions are held to be for fraud and deceit, the acts complained of, the things done, or neglected to be done, are all embraced in the official duty of the directors as defined by the National Banking Act. Nothing was done by the directors voluntarily to influence anybody. They attested the reports in their official capacity because the banking law required it; and did nothing, and said nothing, to the defendants in error outside of their official duty in attesting some of the reports.

A national bank director's duties and obligations are defined by his oath of office prescribed by Sec. 5147, Rev. St. U. S. This section does not require that the director take upon himself an obligation to perform "the duties which usually devolve upon directors in corporations" nor such as devolve upon them "by the common law." On the contrary, he is required to make oath that he "will not *knowingly* violate or *willingly* permit to be violated, any of *the provisions of this title*." Thus the language of the act of Congress seems to definitely exclude common law duties, and to limit the obligations of the director to a compliance with "the provisions of this title." It is true that an obligation is imposed on the director to diligently and honestly administer the affairs of the association "so far as the duty devolves upon him." But the qualification of the obligation touching administrative duties, contained in the clause quoted, is evidently intended to make that provision harmonize and concur with subdivision 7 of Section 5136, authorizing the association "to exercise, by its board of directors, *or duly authorized officers* * * * all such incidental powers as shall be necessary to carry on the business of banking." The power to delegate administrative duties to the executive officers is thus expressly conferred; and assumption of such duties by the oath of office is by the act qualified, and made to depend upon whether the directors, in exercise of their powers, retain administrative duties, or delegate them to executive officers—either of which courses they are, by the statute, permitted to pursue. Having prescribed these specifically defined duties, Congress, in the same act, very appropriately prescribed the liabilities for their violation by Section 5239. By the repeated holdings of this court, already cited, these liabilities are exclusive. So the suggestion that directors are remitted to the common law for a definition of their full official duties is wholly without merit.

Another inquiry from the bench was whether the reports made to the Comptroller were in fact false, and we fear was not sufficiently and definitely answered. The reports were true reports as taken from the bank's books. They agreed with the totals of the assets as shown in the books, but did not in every instance agree with each item of assets as kept under the headings of accounts in the bank's books. The blank forms of the reports were furnished by the Comptroller, and the headings of accounts in these blank forms did not contain some of the items of assets as shown in the bank's books. Consequently a reclassification and re-arrangement of some of the items had to be made in reports to the Comptroller.

But there was no discrepancy in the reports and the books in the statement of the assets, when thus reclassified.

The counsel for the other side claim that the reports were false because the face value of the assets as reported to the Comptroller was not realized by the Receiver in winding up the affairs of the bank. There is no doubt but that the assets did very much depreciate in value owing to the forced sale and the prevalence of a wide-spread financial panic at that time, but we do not understand that the giving of the full amount of the assets in the reports, would constitute a false report. It would be a hazardous undertaking, as well as an untrue report, if the amount of the assets as shown by the books were changed to an *estimated* value, rather than the true amount as shown by the books.

The fact that Mosher, the President of the bank, issued certificates of deposit to the State Treasurer in amounts of $50,000 and $100,000, and entered the transaction on the books of the bank as certificates for $5.00 and $10.00 and the reports of the bank to the Comptroller were made

up on the entries as they appeared on the books, could not bind nor affect the directors of the bank who were innocent, as they all were, of that process of stealing. The facts pertaining to the amounts of such certificates never developed until after the failure of the bank. We rely upon the numerous decisions of the courts cited in our briefs for a reversal of the state court's judgment.

Respectfully submitted,

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